ESTATE OF MARY ANN SNOHOMISH CLADOOSBY

IBIA 85-49 Decided June 11, 1987

Appeal from an order denying reopening issued by Administrative Law Judge Robert C. Snashall in Indian Probate IP PO 164L 83-210.

Motion for continuance denied; orders affirmed; 13 IBIA 8 limited.

1. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

   For purposes of 25 U.S.C. § 464 (1982), in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4

   A member of a non-Federally recognized Indian tribe, who is not an heir or lineal descendant of the decedent, and who has less than one-half Indian blood, is found ineligible to receive a devise of Indian trust land on a reservation organized under the Indian Reorganization Act.

APPEARANCES: Mary McDowell Hansen and Kenneth C. Hansen, for appellant; Harrietta Simmonds Kelly and Freda Simmonds Abrego, pro sese; Colleen Kelley, Esq., Office of the Solicitor, Pacific Northwest Region, Portland, Oregon, as amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On September 18, 1985, the Board of Indian Appeals (Board) received a notice of appeal in the estate of Mary Ann Snohomish Cladoosby, deceased Skagit No. 130-3938 (decedent). The notice of appeal, which was filed with Administrative Law Judge Robert C. Snashall contemporaneously with a petition for reopening, was forwarded to the Board by Judge Snashall after he denied reopening. Judge Snashall's denial of reopening let stand March 22 and 29, 1985, orders in decedent's estate. For the reasons discussed below, the Board affirms the Judge's orders.

Background

Decedent was born on March 7, 1899, and died on May 9, 1982, in Anacortes, Washington. Judge Snashall held a hearing to probate her Indian trust estate on March 20 and November 29, 1984. Decedent's last will and testament, dated May 16, 1974, with a November 3, 1977, codicil, was introduced at the hearing. Under her will, most of decedent's estate was left to Father Thomas McDowell (appellant), 1/ her second cousin.

In an order dated March 22, 1985, as modified on March 29, 1985, Judge Snashall approved decedent's will, but found that 25 U.S.C. § 464 (1982) 2/ made appellant, a member of the non-Federally recognized Samish

1/ Father McDowell died during the pendency of this proceeding. The appeal was continued with the substitution of his estate as appellant.
2/ All references to the United States Code are to the 1982 edition.

Indian Tribe, ineligible to take decedent's trust interests on the Swinomish Indian Reservation. Because the Swinomish Tribe organized under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479, the Judge found section 464 barred the devise to appellant, who was not a member of the tribe, an heir of decedent, or an Indian for whom the United States could hold land in trust status. Consequently, Judge Snashall ordered that decedent's trust interests on the Swinomish Reservation would descend to her heirs through intestate succession. In addition, Judge Snashall held that, although appellant could receive decedent's interests on the Lummi Indian Reservation, those interests passed to appellant out of trust status.

Appellant sought reopening, 3/ which was denied on May 30, 1985. Appellant and several individual appellees filed briefs with the Board on appeal. In addition, by order dated August 18, 1986, the Board requested a brief from the Office of the Solicitor 4/ because of certain apparent similarities between this case and another case pending before the Board. 5/ The Solicitor's brief was received on September 29, 1986.

3/ Appellant should properly have sought rehearing under 43 CFR 4.241, rather than reopening under 43 CFR 4.242. The Board assumes the Judge would also have denied rehearing, and considers the notice of appeal on the merits.

4/ Appellant states it has requested "copies of all memos or other communications between [the Board] and the Central (or D.C.) Solicitor's Office to which the Western Regional Solicitor's Office responded." Filing dated Mar. 31, 1987, at 1. Appellant suggests that if such communications are not provided, a request for them may be filed under the Freedom of Information Act, 5 U.S.C. § 552. As a party to this appeal, appellant has already received copies of all Board communications with anyone in this case. The Board is barred by regulation from engaging in ex parte communications. 43 CFR 4.27(b). The only communications from the Board specifically addressed to the Department are its Aug. 18, 1986, request for briefing by the Solicitor's Office and a Dec. 19, 1986, order requesting, inter alia, the Bureau of Indian Affairs (BIA) to provide it with a copy of the decision concerning Federal acknowledgment of the Samish Tribe.

5/ Briefing revealed that the cases did not involve the same issues.

Motion for Continuance

As previously mentioned, Father McDowell was a member of the Samish Indian Tribe. This Indian group is not a Federally recognized tribe. While the present appeal was pending before the Board, a petition for Federal acknowledgment of the Samish Tribe was pending before BIA.

Because of the representation that BIA was close to publishing a determination on the Samish petition, by order dated December 19, 1986, appellant was given 15 days from receipt of BIA's determination in which to file a brief replying to whatever decision BIA reached. BIA's determination that the Samish Tribe does not exist as an Indian tribe within the meaning of Federal law was published in 52 FR 3709 (Feb. 5, 1987). Appellant did not file a brief within 15 days of publication of this notice. On March 31, 1987, appellant filed an untimely request for a continuance, stating that an appeal from BIA's decision had been filed with the Secretary of the Interior and if the appeal was not resolved to its satisfaction, relief would probably be sought in Federal court. On May 7, 1987, the Secretary of the Interior declined to ask BIA to reconsider its decision.

This case has been pending for several years while appellant sought to show he could take decedent's trust property on an IRA reservation. An additional, indefinite continuance at this time is unfair to the other parties to this case. Appellant's motion for a continuance is denied. Because appellant failed to file a timely reply to BIA's determination as to Federal acknowledgment, this case is ripe for decision.

Discussion and Conclusions

The initial question raised in this appeal is whether appellant can take Indian trust property located on the reservation of an Indian tribe organized under the IRA. The applicable statutory provision is 25 U.S.C. § 464:

> Except as provided in * * * [the IRA], no sale, devise, gift, exchange, or other transfer of restricted Indian lands * * * shall be made or approved: Provided, however, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands * * * are located * * *; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located * * *, to any member of such tribe * * * or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold [land] in trust: * * *.

There is no dispute that the Swinomish Tribe is organized under the IRA. Thus, in order to receive a devise of trust land on that reservation, appellant must be: (1) the tribe in which the lands are located, (2) a member of that tribe, (3) an heir or lineal descendant of the decedent; or (4) an Indian for whom the United States may hold land in Indian trust or restricted status. 6/

[1] Appellant can receive this devise if he is a member of "the tribe in which the land is located." In Williams v. Clark, 742 F.2d 549, 553 (9th Cir. 1984), cert. denied sub nom. Elvrum v. Williams, 471 U.S. 1015 (1985), the court held that "[t]he IRA does not mandate that the tribe in

6/ Because it is clear appellant is neither an Indian tribe nor an heir or lineal descendant of the decedent, these possible sources of rights under the IRA will not be discussed further.

which the lands are located be one tribe." 7/ Thus, it is theoretically possible that a tribe other than the Swinomish might be "the tribe in which the lands are located" for purposes of 25 U.S.C. § 464. Tribal interests in real property are generally acquired in one of six ways: "(1) by action of a prior government; (2) by aboriginal possession; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase." See Cohen's Handbook of Federal Indian Law, 472 (1982 ed.). Appellant does not suggest the Samish Tribe may have acquired an interest in the Swinomish Reservation in any way other than through the treaty originally establishing the reservation. From the court's reasoning in Williams, and our own analysis, we conclude that, for purposes of 25 U.S.C. § 464, in order for a tribe to have a property interest in a reservation based on treaty, the modern day "tribe" must be the continuation of a treaty tribe for which the particular reservation was established. Whether or not a modern day "tribe" which is not concurrently recognized as an Indian tribe by the Department of the Interior is the continuation of an historic tribe is determined through the procedures for Federal acknowledgment as an Indian tribe set forth in 25 CFR Part 83.

7/ See also 742 F.2d at 552:

"If Congress had intended that in areas in which multiple tribes having property rights had not formed a community, only one tribe would manage the property and thus be the tribe in which the lands are located under section 4, it must also have intended to divest the other tribes and designate that one tribe. Congress did not do so, or refer to tribes as being any other than those having property rights in an area. We therefore conclude that section 4 comprehends all tribes having property rights in an area. To hold otherwise would require courts to determine which tribes could manage land and which would be divested of their property rights in each reservation or area in which multiple tribes having property rights have not formed a community. We decline to do this. Although courts routinely determine property rights, Indian property rights are unique in that they are directly conferred and subject to comprehensive statutory and administrative regulation. Thus, we decline to hold that IRA divests Indian tribes of existing property rights absent some indication that Congress so intended."

Appellant is a member of the Samish Tribe, which has been determined not to be a continuation of an historic tribe following the Part 83 procedures. 52 FR 3709 (Feb. 5, 1987). In United States v. Washington, 476 F. Supp. 1101, 1104 (W.D. Wash. 1979), aff'd 641 F.2d 1368 (9th Cir. 1981), cert. denied sub nom. Duwamish Indian Tribe v. Washington, 454 U.S. 1143 (1982), the Samish Tribe was also found not to be "a political continuation of or political successor in interest to any of the tribes or bands of Indians with whom the United States treated in the treaties of Medicine Creek and Point Elliott." See especially 476 F. Supp. at 1105-06. We hold the Samish Tribe cannot be a "tribe in which the lands are located" for IRA purposes.

[2] Thus, appellant is entitled to receive this devise only if he is otherwise an Indian for whom the United States can hold land in Indian trust or restricted status. "Indian" is defined for IRA purposes in 25 U.S.C. § 479:

> The term "Indian" as used in sections * * *464 * * * of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Appellant is not a member of a recognized Indian tribe now under Federal jurisdiction. He makes no claim that he is a descendant of a member of a Federally recognized Indian tribe or that he or any of his ancestors were residing within the present boundaries of an Indian reservation on June 1, 1934. Finally, appellant claims only 1/8 Indian (Samish) blood.

Appellant cites Garrett v. Assistant Secretary for Indian Affairs, 13 IBIA 8, 91 I.D. 262 (1984), for the proposition that he must show only United States citizenship and American Indian background to have land held in Indian trust or restricted status. The language upon which appellant relies appears in 13 IBIA at 18, 91 I.D. at 268: "Because Thomas Bokas was a citizen of the United States and an American Indian, he was a person for whom the United States could hold land in Indian trust status." Also, in footnote 7, 13 IBIA at 18, 91 I.D. at 268, the Board quoted a statement from the Assistant Secretary's brief which explained that there was a general policy to continue the trust or restricted status of inherited or devised land even though the heir or devisee might not be a tribal member or eligible for other Federal benefits to "Indians." The Board then stated: "The Federal trust responsibility runs to Indians, not merely to members of Indian tribes."

In Garrett there was no question that, if Bokas was an American citizen, he was otherwise an Indian for whom the United States could hold land in trust or restricted status. The record before the Board showed Bokas was 4/4 Indian, and at least 1/2 Yankton Sioux, a Federally recognized tribe. This fact led to the overly broad statements quoted above. To the extent those statements are overly broad, Garrett is hereby limited to its facts. 8/

8/ It remains true, however, that some persons of Indian descent who are not members of a recognized Indian tribe may still be eligible for certain Federal benefits to "Indians." See Underwood v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 3, 14-15, 93 I.D. 13, 19-20 (1986), and statutes and regulations cited therein. But see, further discussion, infra.

Because appellant was not entitled under the IRA to receive a devise of real property on the Swinomish Reservation, Judge Snashall properly found the devise to appellant failed and ordered decedent's trust interests on that reservation to descend by intestate succession.

Furthermore, Judge Snashall also properly held that decedent's trust interests on the Lummi Reservation descended to appellant out of trust. Because the Lummi Indian Tribe has not organized under the IRA, appellant can receive a devise of interests on that reservation.

Again citing footnote 7 of the Board's Garrett decision, appellant argues, however, that because he is of Indian descent, the trust or restricted status of decedent's property on the Lummi Reservation should be continued. Departmental counsel clarifies the Assistant Secretary's statement quoted in footnote 7 of Garrett by explaining that the trust or restricted status of inherited or devised property is continued only when the heir or devisee is descended from a member of a Federally recognized Indian tribe, even though he or she may be ineligible for tribal membership or Federal services to "Indians." 9/ Again, the overly broad statement in Garrett, engendered by the knowledge that there was no question that the land at issue could be held in trust or restricted status for Thomas Bokas if American citizenship were

---

9/ The fact that a person of Indian descent may not be eligible to have land held in trust or restricted status is seen in 25 CFR 152.6:

"Whenever the Secretary determines that trust land, or any interest therein, has been acquired through inheritance or devise by a non-Indian, or by a person of Indian descent to whom the United States owes no trust responsibility, the Secretary may issue a patent in fee for the land or interest therein to such person without application." Emphasis added.

found, must be limited. Cf. Quiver v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 344, 92 I.D. 628 (1985) (members of the terminated Klamath Indian Tribe are not eligible to have land held in Indian trust or restricted status).

Therefore, because appellant is not an Indian for whom the United States can hold property in Indian trust status, the land must pass out of trust. 10/ Bailess v. Paukune, 344 U.S. 171 (1952); Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966); Estate of Dana A. Knight, 9 IBIA 82, 88 I.D. 987 (1981).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Snashall's orders in this estate are affirmed and Garrett v. Assistant Secretary for Indian Affairs, 13 IBIA 8, 91 I.D. 262 (1984), is limited as indicated in this opinion.

_____
Kathryn A. Lynn
Administrative Judge

I concur:

_____
Anita Vogt
Acting Chief Administrative Judge

10/ Appellant, furthermore, is not a person for whom the United States could acquire land in Indian trust or restricted status. 25 CFR 151.2(c).